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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 479

MERCHANTS NATIONAL BANK & TRUST COMPANY OF INDIANAPOLIS, SUCCESSOR BY CONSOLIDATION TO THE INDIANA TRUST COMPANY, EXECUTOR AND TRUSTEE UNDER THE WILL OF GUY E. STREET, DECEASED,

Petitioner,

v.

UNITED STATES OF AMERICA AND GARY CAMPBELL, DISTRICT DIRECTOR OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING

Petitioner presents its petition for a rehearing of this Court's order dated November 25, 1957, denying the peti-

tion for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit, and, in support thereof, respectfully shows:

Grounds for Rehearing

I. An Intervening Indiana Decision Shows That the Decision Herein Determined Indiana Law Erroneously.

On November 22, 1957, three days before this Court denied the petition for certiorari herein, the Appellate Court of Indiana decided an appeal in *Sims v. Sims*,[1] involving the rule that the amount of alimony should be measured by the amount of property which a widow would take upon her husband's death. For a unanimous Appellate Court, Chief Justice Crumpacker held:

> "The evidence in the record most favorable to the court's adjudication of property rights between the parties tends to establish the *appellant's net worth at the time of trial at $250,250.00*. According to the appellant's own figures the cash and tangible property awarded to the appellee by the court's decree aggregates $91,607.93. That is approximately $8,000.00 over and above what the appellee could have taken despite an unfavorable will had the appellant died."

This computation coincides with that made by the taxpayer in this case, since one-third of the estate of $250,250.00 after debts, but before deduction of any inheritance or estate taxes, is $83,417.17 or $8,190.00 less than the alimony figure the court was comparing. The Appellate Court of Indiana, which has appellate jurisdiction over the apportionment of federal estate and Indiana inheritance taxes, has thus, for the first time, indicated expressly that no apportionment of the federal estate tax

[1] Indiana Appellate Court No. 18794.

should be made against the statutory share of a widow who elects to take against a will. The *Sims* decision was unanimous. Participating in it was Judge Wilbur Royse, who wrote the opinion of the Appellate Court in *Pearcy v. Citizens Bank & Trust Co.* (1951), 121 Ind. App. 136, 96 N. E. 2d 918, 925-927, 98 N. E. 2d 231. The *Pearcy* case arose on facts which preceded the 1948 federal marital deduction act, but it adopted the Kentucky rule of equitable apportionment of federal estate taxes without any statute governing apportionment. Although most of the equitable apportionment states are such by statute, the *Pearcy* case leaves no question that both Indiana and Kentucky are equitable apportionment states without statute. All the equitable apportionment states, including Kentucky,[2] which considered the apportionment of federal estate taxes against a widow's share in property qualifying for the marital deduction have refused equitably to apportion any part of the federal estate tax against such property, since such property does not give rise to any part of the tax. The Sims case now applies the rule of equitable apportionment which became law in Indiana with the *Pearcy* case in exactly the same fashion as all the other equitable apportionment states have applied it to marital deduction property.

In the face of the Indiana Appellate Court's opinion as expressed in the *Sims* case, the Seventh Circuit's reversal of the Marion County Probate Court's and the United States District Court for the Southern District of Indiana's determination of Indiana law herein is definitely erroneous. The Seventh Circuit ignored the terms of the will, the reasoned construction of the will by the trial Courts and the Statutes (Burns' 6-1907 and 6-2334) and decisions (*Rocker v. Metzger*, 171 Ind. 364 and *Cassid v.*

[2] *Lincoln Bank and Trust Co. v. Huber* (Ky. 1951), 240 S. W. 2d 89.

Padgett, 99 Ind. App. 239) on the effect of a widow's election to take against a will. It ignored the rule of the *Pearcy* decision, apparently on the basis that the facts in the *Pearcy* case were distinguishable, which was strictly true. (See Seventh Circuit's Opinion, Petition P. 33, n. 7.) The Seventh Circuit based its unique interpretation of Indiana law on part of the reasoning (not the holding) of *Clark v. Clark* (1892), 132 Ind. 35 and *Rawley v. Sanns* (1895), 141 Ind. 179, two cases involving title to real estate and holding that a surviving husband elected by estoppel to take *under* his wife's will pursuant to 1891 statutory provisions which were repealed in 1907 by Burns' 6-2334, and on a third case, *Cornet v. Guedelhoefer*, 219 Ind. 200, in which no surviving spouse was involved and the court enforced a specific agreement of the parties to repay an advancement for $900.00 of federal estate taxes when the personal property in the estate was insufficient to pay the tax. The *Sims* case establishes that the trial Courts herein were right. The Indiana rule of equitable apportionment as announced in the *Pearcy* case means that Indiana law precludes the apportionment of any part of the federal estate taxes against property which would otherwise qualify for the marital deduction, even when such property comes to the widow because of her election against a will.

The preceding argument (I) and the related point following (II) establish grounds for a rehearing because of intervening circumstances of substantial or controlling effect, as in *Sanitary Refrigerator Co. v. Winters*, 280 U. S. 30, 34, footnote 1, and *Massey v. United States*, 291 U. S. 608.

II. Conflict With Other Circuits and Decisions of This Court.

In view of the fact that Indiana is now clearly established as an equitable apportionment state, even as to a widow's property acquired by election against a will and since the 1948 federal marital deduction act, *the decision of the Seventh Circuit herein conflicts with the Third Circuit's decisions in Babcock's Estate v. Commissioner (1956), 234 F. 2d 837 and Gallagher v. Smith (1955), 223 F. 2d 218 and the Fourth Circuit's decision in Pitts v. Hamrick (1955), 228 F. 2d 487.* The *Babcock* case involved a widow's election against the will and is in all material facts identical with this, except that it reversed the Tax Court and held for the taxpayer. The decision herein fails to give controlling effect to state law on federal estate tax apportionment as required by *Riggs v. Del Drago* (1942), 317 U. S. 95 and to the definitive effect of the Probate Court's determination of questions of state law, as required by *Blair v. Commissioner*, 300 U. S. 5, 9, 10.

III. Under Any Construction of the Will, the Tax Clause Has Some Effect On the Widow's Share.

The petition for certiorari failed to make one argument based on the terms of the will herein, because the necessity of such an argument was not apparent under a correct application of the express direction in the will (Item I and Item V, 10) that petitioner should pay inheritance and estate taxes out of the residue of the will. The correct interpretation of this clause is that it was unaffected by the widow's election to take against the will (except as such election reduced the residuary property), since this was not a provision for the widow and could not be renounced by her. Burns' (1933) 6-2334 (pages 74-75 of

Petition herein). *Commerce Union Bank v. Albert* (Tenn. 1957), 301 S. W. 2d 352.

However, *even under the incorrect interpretation that said clauses are beneficial provisions for the widow (see Seventh Circuit's Opinion in Petition, page 30), the widow is still entitled to have one-half of her estate and inheritance taxes paid out of the residue and not assessed against marital deduction property which she took free of the residuary trust.* Under Indiana law, when a widow renounces her interest in a will, she gets not only her statutory share, but, in addition, her intestate share of any provisions for her in the will. *Rocker v. Metzger* (1908), 171 Ind. 364, 86 N. E. 403, 404, 405. This applies to residuary provisions such as Item V, 10 of the will herein, since the residuary property has no place to go upon lapse except to pass by intestacy. *Cassidy v. Padgett* (1934), 99 Ind. App. 234, 190 N. E. 133, 136. It cannot be argued, in the face of these Indiana decisions, that a widow's rights upon renunciation are purely statutory and render the will a complete nullity as to her. *Piersol v. Hays* (1943), 113 Ind. App. 214, 47 N. E. 2d 834 held that a will governs the administration of the entire estate, including intestate property.

Here a fund, part of the residuary trust, was set aside for the payment of estate and inheritance taxes. Even though this fund be construed as a benefit to the widow, her renunciation could not divert the fund from its intended use or write a clause in the will giving it to someone else. It became intestate property, available in equal shares to the widow and her daughter, testator's only heirs at law. In fact, it was all used to pay all of the inheritance and estate taxes, as the stipulation herein showed. Even under the Seventh Circuit's construction

of the will, the widow was entitled to one-half of her beneficial interest in this fund by intestacy, so that at least one-half of the inheritance and estate taxes against her marital deduction property should have been paid out of the residue and could not reduce the marital deduction. Under this view, a refund of half the amount ordered by the District Court, or $11,347.26, with interest at 6% from July 15, 1954 is due petitioner.

This new substantial grounds was not previously argued by the petitioner and is ground for rehearing under *Schriber-Schroth Co. v. Cleveland Trust Company*, 305 U. S. 47, 50.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit.

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RALPH B. GREGG,
Counsel for Petitioner.

Of Counsel:
ARTHUR H. NORTHRUP.

CERTIFICATE OF COUNSEL

I, Ralph B. Gregg, counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the rules of this Court.

.....

RALPH B. GREGG,
Counsel for Petitioner.